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Attorneys for Respondent.

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IN THE

SUPREME COURT

OF THE

UNITED STATES.

October Term, 1932

No. 518.

Pacific Coast Steel Company, a corporation,

Petitioner,

vs.

John P. McLaughlin, United States Collector for the First Collection District of California,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF FOR THE PETITIONER.

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IN THE

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UNITED STATES.

October Term, 1932

No. 518.

Pacific Coast Steel Company, a corporation,	*Petitioner,*
vs.	
John P. McLaughlin, United States Collector for the First Collection District of California,	*Respondent.*

BRIEF AND ARGUMENT ON BEHALF OF THE PETITIONER.

OPINION BELOW.

No written opinion was rendered by the United States District Court for the Northern District of California, Southern Division in which court this suit was initiated. The opinion of the United States Circuit Court of Appeals for the Ninth Circuit [R. 65], affirming the judgment of the District Court [R. 86], is reported in 61 Fed. (2d) 73.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered August 22, 1932. [R. 87.] The petition for a writ of *certiorari* was duly filed, and *certiorari* was granted on January 9, 1933, limited to the question of the effect of Section 278(e) of the Revenue Act of 1924. Jurisdiction is conferred upon this Court by Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION INVOLVED.

In the petition for writ of *certiorari* several errors were assigned and questions presented. This Court granted the petition limited to the question of the effect of Section 278(e) of the Revenue Act of 1924. The question thus presented in this proceeding might be stated as follows:

Does Section 278(e) of the Revenue Act of 1924 restrict all applicable statutes or rules of law from authorizing the collection of a tax assessed before June 2, 1924, where such collection was barred by operation of the Statute of Limitation before June 2, 1924; and, does that section restrict all legal authorization to extend by waiver given after June 2, 1924, the period of limitation for collection of a tax from application to any case where the tax was assessed before June 2, 1924, and where such collection was barred by the Statute of Limitations before June 2, 1924.

STATEMENT.

A complete statement of the case combining petitioner's contentions regarding the several issues involved is given on pages 4 to 8 of the Petition for Writ of *Certiorari* filed in this proceeding. In view of the limitation of the issue to be considered by this Court there is repeated here a brief statement of the facts containing merely an added statement of petitioner's contention as to how the question involved and now before this Court affects this proceeding.

On March 30, 1918, the petitioner duly filed its 1917 income and profits tax return, and duly paid the tax shown thereon. [R. 4, 28, 65.]

On December 16, 1922, the petitioner filed a waiver (set out in full in Appendix A to Petition for Writ of *Certiorari* filed in this proceeding), consenting to a "determination, assessment, and collection" of its 1917 taxes "irrespective of any period of limitations." [R. 6, 11, 28, 66.] This waiver expired April 1, 1924. [R. 69.]

On February 9, 1923, an additional tax for 1917 was duly assessed against the petitioner in the amount of $257,443.30. [R. 6, 28, 66.]

On April 1, 1924 (the date of expiration of the December 6, 1922, waiver filed by petitioner), the period for collection of the aforesaid deficiency in taxes expired by virtue of the provisions of Section 250(d) of the Revenue Act of 1921. [R. 69, 70.]

On June 2, 1924, the Revenue Act of 1924 was enacted.

On December 7, 1925, the petitioner filed a waiver (set out in full in Appendix B to Petition for Writ of *Certiorari* filed in this proceeding), of the "time prescribed by law for making any assessment", of 1917 taxes [R. 6, 13, 28, 66] and the waiver further provided that "this waiver for making any assessment as aforesaid shall remain in effect until December 31, 1926, and shall then expire," unless an appeal is filed to the Board of Tax Appeals. This waiver was not signed by the Commissioner of Internal Revenue nor by any one for him. [R. 13.] The petitioner contended that this waiver was "invalid and ineffective" for the following reasons:

(1) It was an *assessment* waiver which was the only kind of waiver authorized by Section 278(c) of the Revenue Act of 1924, there being no need of collection waivers because of Section 278 (d) which allowed six years after assessment for collection. This waiver could, therefore, not be construed as a waiver authorizing the *collection* of a barred tax.

(2) Section 278 (e) restricts the other subdivisions of Section 278. Therefore, Section 278 (e) would prevent any waiver filed under Section 278(c) from being effective in its application to any assessment or collection of tax which was barred at the time of the enactment of the Revenue Act of 1924.

Regarding petitioner's contention in this regard, the Circuit Court concluded:

"We find no language in subdivision (e) of Section 278 or in any other part of the Act of 1924 that expressly forbids taxpayers from pursuant to the

comprehensive wording of subdivision (c) voluntarily waiving the bar against the collection of validly assessed and unpaid taxes, the collection of which was barred on June 2, 1924." [R. 72.]

"We are of the opinion that the waiver voluntarily executed by the appellant taxpayer on December 7, 1925, was effective and that it operated to revive the right of the Government to collect the taxes that had been lawfully assessed on February 9, 1923, although at the time this waiver was given and prior to the date the Revenue Act of 1924 became effective, the statute of limitations had run against the remedy of collection. We think this conclusion is in consonance with the decision of the Supreme Court. See Burnet v. Railway Equipment Co., 282 U. S. 298; Stange v. U. S., 282 U. S. 274; Brown and Sons v. Burnet, 282 U. S. 283; Aiken v. U. S., 282 U. S. 277." [R. 78.]

On February 26, 1926, the Revenue Act of 1926 was enacted.

On November 29, 1926, the petitioner filed a waiver (set out in full in Appendix C to Petition for Writ of *Certiorari* filed in this proceeding) of the "time prescribed by law for making any assessment" of 1917 taxes. [R. 6, 29, 67.] The waiver further provided that "this waiver of the time for making any assessment as aforesaid shall remain in effect until December 31, 1927, and shall then expire."

On June 30, 1927, a part payment of $111,953.71 was made against said 1917 deficiency [R. 7, 28, 67] (which deficiency had theretofore by valid credits been reduced to $215,064.84), by the application by

the Commissioner as a credit against said deficiency, of an amount of $111,953.71 representing overpayments by this petitioner of its income and profits taxes for the years 1918 and 1919.

December 31, 1927, was the expiration date of the waiver period specified in the November 29, 1926, waiver.

On August 27, 1928, the balance of the 1917 deficiency of $103,111.16 plus interest of $26,808.90 was collected by the respondent. [R. 8, 28, 67.]

STATUTES INVOLVED.

In the Petition for Writ of *Certiorari* and Brief in Support Thereof filed in this proceeding, there is contained as Appendix D a statement of the statutes involved. In the interest of brevity they are not repeated here.

SPECIFICATIONS OF ERROR.

In connection with the sole question to which this proceeding before this Court is now limited, the error complained of is:

The Circuit Court of Appeals erred in holding that Section 278(e) of the Revenue Act of 1924 did not qualify Section 278(c) of said Act in respect to waivers on collection of taxes barred prior to June 2, 1924, and that Section 278(e) did not restrict the authority conferred by Section 278(c) to waive the bar of the Statute of Limitation against collection, from applying to any case where the tax was assessed before June

2, 1924, and where the collection was barred prior to June 2, 1924, and in holding therefore that the waiver of December 7, 1925, "was effective and that it operated to revive the right of the government to collect the taxes that had been lawfully assessed on February 9, 1923, although at the time this waiver was given and prior to the date of the Revenue Act of 1924 became effective, the Statute of Limitations had run against the remedy of collection." [R. 78.]

PROPOSITIONS OF LAW.

I.

The effect of Section 278(e) is to restrict Section 278 from any retroactive effect and to deprive Section 278 of any possible application to cases where assessment was made prior to June 2, 1924, and where collection was barred by the Statute of Limitations prior to June 2, 1924.

Sections 277, 278, Revenue Act of 1924;

Russell v. U. S., 278 U. S. 181;

U. S. v. Whyel, 28 Fed. (2d) 30;

Uncasville Mfg. Co. v. Commissioner, 55 Fed. (2d) 893.

II.

Retroactive effect should not be given to a statute unless it clearly appears that the law-making body so intended.

U. S. v. Magnolia Petroleum Co., 276 U. S. 160;

Russell v. U. S., supra.

III.

In construing a statute the legislative proceedings culminating in its enactment should be considered for the purpose of ascertaining the meaning of doubtful or ambiguous language, and for determining the legislative intent where the meaning of the statute is obscure.

Blake v. The National City Bank, 90 U. S. 307;

Binns v. U. S., 194 U. S. 486, 495;

U. S. v. Whyel, supra;

Marx v. Hawthorne, 148 U. S. 172.

IV.

Where the enacting clause is general in its language and object, and a proviso or exception is afterwards introduced, that proviso or exception is construed strictly, and takes no case out of the enacting clause which does not fairly fall within its terms.

U. S. v. Dickson, 15 Pet. 141;

Fed. Reserve Bank v. Webster, 287 F. 579.

V.

Where the purpose of the legislature to abrogate or modify the common law rule is clear, the statute must be executed according to its terms and must be strictly construed.

U. S. v. Matthews, 173 U. S. 381;

McCool v. Smith, 1 Black 459;

Thompson v. Thompson, 218 U. S. 611;

Corn Products Refining Co. v. Com., 22 B. T. A. 605.

VI.

If it can be gathered from a subsequent statute in *pari materia* what meaning the legislature attached to the words of a former statute, they will amount to a legislative declaration of its meaning and will govern the construction of the first statute.

Alexander v. Alexandria, 5 Cranch. 7;

Joy Floral Co. v. Commissioner, 29 Fed. (2d) 865.

However, changes introduced into a subsequent statute in *pari materia* cannot authorize a construction of the former statute not consonant or consistent with the language employed in the earlier one.

Russell v. U. S., supra.

VII.

If possible, effect should be given to every clause and part of the statute, and the words used should be given their known and ordinary signification.

D. Ginsberg & Son v. Popkin, 285 U. S. 204;

Old Colony R. Co. v. Commissioner, 284 U. S. 552.

VIII.

Taxing acts, including provisions of limitation embodied therein, are to be construed liberally in favor of the taxpayer.

Bowers v. New York & A. Lighterage Co., 273 U. S. 346, 349;

U. S. v. Updike, 281 U. S. 490.

SUMMARY OF ARGUMENT.

Section 278 has no application to 1917 tax assessments made before the enactment of the Revenue Act of 1924 (June 2, 1924) and it could not therefore authorize an extension by waiver of the period for collection of such tax where before the enactment of the Act the period for collection had already expired.

1. Section 278 operates prospectively only.

2. Subdivision (e) of Section 278 expressly excludes from the influence of Section 278 assessments made before the enactment of the Revenue Act of 1924.

3. It was the intent of Congress in enacting the 1924 Act to distinguish between assessments of taxes under prior acts made before the enactment of the 1924 Act and those made thereafter, and this intent is apparent not only from the construction of Section 278 but also from the legislative history of the enactment of that section.

4. Section 278(e) restricts Section 278(c) from application to assessments made prior to June 2, 1924.

5. Section 278 expresses the *only exceptions* from the application of the general limitation provi-

sions contained in Section 277. Since by its own terms it specifically provides that it should not include as one of the exceptions anything which might affect assessments made before June 2, 1924 or revive any rights barred by the statute of limitations prior to June 2, 1924, Section 277(a)(2) would prohibit the collection of any assessment of 1917 taxes after five years after the 1917 return was filed.

6. The provisions of the limitation statutes of the 1926 and 1928 Act should be construed as declaratory of the intended meaning of Section 278 of the Revenue Act of 1924; therefore, under Section 278 of the Revenue Act of 1924 as construed by the later Acts, any waiver given after the limitation period had expired and after the date of enactment of the Revenue Act of 1924 is ineffective.

7. Section 278(c) provided only for waivers to extend the period for assessment. There was no provision authorizing waivers of the period for collection and it was consistent with the intent of Congress that there be this omission since there could then be no authorization of reviver by waiver of the right to collect a tax where such right of collection had been barred prior to June 2, 1924.

ARGUMENT.

Previous Expression by This Court Upon the Question Herein Involved.

Although the question herein involved was not material in the final decision of this Court in the case of *Burnet v. Chicago Railway Equipment Company*, 282 U. S. 295, 51 Sup. Ct. 137, this Court referred to the question and commented upon it although specifically reserving any definite decision. The facts in that case and the manner in which this question was raised is as follows:

The taxpayer filed its 1918 return on *June 16, 1919*, and an additional tax was proposed on *March 14, 1925*. The taxpayer filed an appeal to the Board of Tax Appeals from this determination on May 6, 1925, and on December 10, 1925, executed a waiver, which was signed by the Commissioner, extending the time for making assessment until December 31, 1926, or until after decision of the Board of Tax Appeals. The Court held that the waiver was not inoperative because executed after the expiration of the five-year period fixed by Section 277(a) of the Revenue Act of 1924, in view of the provisions of Section 278(c) that where both the Commissioner and the taxpayer have consented in writing to the assessment of the tax after the time prescribed in Section 277 for its assessment, the tax may be assessed at any time prior to the expiration of the period agreed upon, and Section 278(c)

was held to apply because the statute of limitations for assessment of the 1918 tax did not expire until *June 16, 1924,* which was *after* the enactment of the 1924 Act. The taxpayer, in an endeavor to sustain his argument that under the 1924 Act a waiver accepted after the statute of limitations had expired was invalid, used the argument that to hold otherwise would cause a discrimination between cases where the period for assessment expired *prior* and where it expired *subsequent* to June 2, 1924, the taxpayer assuming that under the provisions of Section 278(e) no waiver could be accepted after the statute of limitations had expired, where such expiration occurred prior to June 2, 1924. In regard to this, this Court stated:

> "The further argument is made that in view of other sections in the 1924 Act,[2] an interpretation of Sec. 278(c) which permitted the giving of a waiver after the expiration of the five years, would lead to absurdities and inequalities which Congress could not have intended. Reference is made, first, to Sec. 278(e)[3] which, it is urged, renders inoperative any waiver signed after the enactment of the statute where the tax in question was already barred prior thereto.[4] The inequality charged is that the limitation period for the assessment of 1918 taxes due under a return filed before June 2, 1919, could not, under the suggested interpretation, be waived after June 2, 1924, but that the corresponding limitation for the same tax due under a return filed after June 2, 1919, could be so waived. We need not determine

whether respondent is correct in assuming that Sec. 278(e) qualified Sec. 278(c) in respect to waivers on assessment of taxes barred prior to June 2, 1924,[5] for even if that section has this effect, no objectionable inequality would result in permitting a revival of liability in one case and not in the other. *Some arbitrary date must be taken for the imposition of a period of limitation.* It may be taken likewise in regard to its removal." (Italics ours.)

---

[2] Respondent also cites sec. 278(e) of the Revenue Act of 1926, c. 27, 44 Stat. 9, 59, which reenacted sec. 278(e) of the 1924 Act, and urges that particular discriminations would result from the combined effect, under certain suggested interpretations, of these two sections. But the effect of a later statute cannot authorize an unintended and undesirable construction of an earlier act. Compare Russell v. United States, 178 U. S. 181, 188, 49 S. Ct. 121 (7 Am. Fed. Tax Rep. 8839).

[3] "(e) This section shall not (1) authorize the assessment of a tax * * * if at the time of the enactment of this Act such assessment * * * was barred by the period of limitation then in existence. * * *." 43 Stat. 300.

[4] In the case at bar, the assessment would not have been barred until June 16, 1924, five years from the date of the return, and after the enactment of the 1924 Act, so that sec. 278(e) is wholly inapplicable. Respondent offers the case of a tax under an earlier return merely for the purposes of its argument.

[5] Subdivision (e) cannot be said to qualify every other subdivision in sec. 278. Nothing indicates an intention to have it limit the effect of sec. 278(a) which permits **assessment** to be made or suit to be brought at any time in the case of a false or fraudulent return or a failure to file any return. Compare United States v. Updike, 281 U. S. 489, 495, 50 S. Ct. 367, 74 L. Ed. 984 (8 Am. Fed. Tax Rep. 10916); United States v. Lazenby, 5 Fed. (2d) 827 (5 Am. Fed. Tax Rep. 5458). Nor is there any indication that it should qualify subsection (c) which provides for the giving of waivers. But see Jacobs Brothers Co. v. Commissioner, 19 B. T. A. 315, which involved sec. 278(c) and related sections of the 1926 Act. Supra, note 2. Compare Gillespie v. Commissioner, 20 B. T. A. 1068, 1079; Steiner Mfg. Co. v. Commissioner, 18 B. T. A. 740; James & Holmstrom Piano Co. v. Commissioner, 19 B. T. A. 322; Wetherell Bros. Co. v. White, D. Mass. (par. 306), decided December 3, 1930, U. S. Daily, December 30, 1930, p. 3291. The decision in Russell v. United States, 278 U. S. 181, 49 S. Ct. 121 (7 Am. Fed. Tax Rep. 8839), involved the interpretation of subdivision (d) which extended the period for collection without any act on the part of the taxpayer. Subdivision (c) is effective only if the taxpayer voluntarily executed a waiver.

This Court's Interpretation of Section 250(d) of the Revenue Act of 1921 as Expressed in the Cases of Stange v. U. S. and Aiken v. Burnet, Should Not Be Followed as the Proper Interpretation of Sections 277 and 278 of the Revenue Act of 1924. Sections 277 and 278 Comprise a New and Complete Statute of Limitation Whose Terms Must Be Construed to Comprehend the Meaning Intended by the Legislature.

INTERPRETATION OF SECTION 250(d) OF THE REVENUE ACT OF 1921.

The 1921 Act was the first to interpose a limitation upon the right of the government to enforce a tax liability already accrued. Under the Act of 1913 there was a three-year limitation on assessment but there was no limitation upon the time within which the tax liability could be enforced by suit without a prior assessment. The 1921 Act barred collection in any manner after five years unless both the Commissioner and the taxpayer consented in writing to a later determination, assessment, and collection of the tax. (*Stange v. U. S.*, 282 U. S. 270.)

There is no question that prior to 1921 the limitation periods on assessment could be waived by the taxpayer in the same fashion as other statutes of limitations are waived, that is, by the giving of a so-called common-law waiver (*Corn Products Refining Co. v. Commissioner*, 22 B. T. A. 605, 624; *Aiken v. Burnet*, 282 U. S. 278, 280) and the debt could be effectively revived even though the waiver be given after the bar of the statute had fallen. (*Stange v. U. S., supra.*)

There is nothing in the Revenue Act of 1921 to indicate an intention upon the part of the legislature to restrict the right of the taxpayer to give and the Commissioner to accept the so-called common law waivers. It is true that Section 250(d) specifically authorizes the use of waivers but such authorization does not declare any intention that it is to abrogate the right to accept the so-called common-law waiver. Conditions existing at the time the Revenue Act of 1921 was enacted, and the wording of Section 250(d), were such that:

> "Congress must have intended that a waiver should be operative even though before the passage of the act, five years had elapsed from the time the return had been filed. Among the earlier revenue acts referred to in Sec. 250(d) was that of (August 5), 1909, the returns under which were required to be filed more than ten years prior to the passage of the 1921 Act. Section 38, Third, 36 Stat. at L. 114, Chap. 6. And returns under the Revenue Act of 1913 were required to be filed more than six years before the passage of the 1921 Act."
>
> "Unless it is to be rendered practically meaningless as applied to tax returns under these earlier acts, it must be construed to permit the execution of waivers after the period of five years." (*Stange v. U. S., supra.*)

So, under the Revenue Act of 1921, Section 250(d), the waivers were valid even though given after the statutory period for collection had expired and after the enactment of the Revenue Act of 1921.

Under the construction given to Section 250(d) of the Revenue Act of 1921 by this Court, it appears that the

purposes of Section 250(d) might be stated to be to place a definite statutory period of limitation on assessment and collection of taxes for any taxable year under any Revenue Act, and to incorporate as statutory law the common law rule providing for the waiver of the bar of the statute of limitation at any time, with the added requirement, inserted to meet exigencies of administration (*Aiken v. Burnet*), that the Commissioner of Internal Revenue sign the waiver or consent.

In all Revenue Acts following the Revenue Act of 1921, there is specific provision regarding the use, validity and effect of waivers. (Sec. 278(c), Revenue Acts of 1924 and 1926; Sec. 506, Revenue Act of 1928; Sec. 276(b), Revenue Act of 1932.) So, commencing with the Revenue Act of 1921 the common law rule as to the effect and validity of waivers is operative only so far as it is not controlled, modified or abrogated by those provisions of congressional enactment in the various Revenue Acts relating to waivers. (*Western Union Tel. Co. v. Call Publishing Co.*, 181 U. S. 92; *Federal Mining & Smelting Co. v. Wittenberg* (1927), 138 Atl. 347 (Sup. Ct. of Delaware); *Corn Products Refining Co. v. Commissioner*, 22 B. T. A. 605, 625.) And in the ensuing discussion of the effect of Sections 277 and 278 of the Revenue Act of 1924, we will show that, while the common-law rule regarding waivers was incorporated as part of Section 250(d) of the Revenue Act of 1921, that rule was completely abrogated and entirely replaced by Sections 277 and 278 of the Revenue Act of 1924 which were enacted to provide for *all* cases of limitations and for authorizations of waivers for extending limitation periods where Congress intended such periods might be

extended. *Where the purpose of the legislature to abrogate or modify the common law rule is clear, the statute must be executed according to its terms and must be strictly construed.* (*U. S. v. Matthews,* 173 U. S. 381; *McCool v. Smith,* 1 Black 459; *Thompson v. Thompson,* 218 U. S. 611.)

SECTION 250(d) WAS NOT REENACTED IN THE REVENUE ACT OF 1924. SECTIONS 277 AND 278 OF THE 1924 ACT IS NEW LAW, AND ALONE PROVIDE FOR THE PERIOD OF LIMITATIONS TO APPLY TO ALL CASES, AND FOR THE AUTHORIZATION OF THE EXTENSIONS OF SUCH PERIODS BY WAIVERS IN ALL THOSE CASES IN WHICH THE LEGISLATURE INTENDED THE PERIOD MIGHT BE SO EXTENDED.

Legislative History of Sections 277 and 278 of the Revenue Act of 1924.

The Revenue Act of 1921 was in effect until June 2, 1924, the date of enactment of the Revenue Act of 1924. A different condition existed on June 2, 1924, than in November, 1921, when the Revenue Act of 1921 was enacted. The Revenue Act of 1921 was the first Act to really place the Commissioner of Internal Revenue on notice that Congress intended that the time for determining taxes relating to years long past gone should have some definite limitation. Because it was first notice it is reasonable that Congress should have intended that the limitation provisions of the Act should be liberally construed. However, almost three years elapsed after the enactment of the 1921 Act before the 1924 Act was enacted. The burden of taxes for old years, particularly the excess profits tax years of 1917 and 1918, became

more and more oppressive to the taxpayers. And Congress, having allowed the Commissioner three years' opportunity under a liberal limitations statute, was moved to adopt a more strict provision regarding limitation periods and to in effect place a definite seal upon the status of assessments and collections as they then existed. So in enacting the Revenue Act of 1924 Congress intended by Sections 277 and 278 to fix beyond change the status of assessments and collections as they existed on the date of enactment of the Act of 1924. In other words, if the assessment, distraints, or proceedings for collection were barred on that date they remained barred; if begun and alive, they were to continue unaffected. (*U. S. v. Whyel*, 28 Fed. (2d) 30.) Congress intended that the limitations statute as enacted in those sections should be a real statute of repose (*Spear & Co. c. Heiner*, 34 Fed. (2d) 795), particularly as to tax assessments made prior to the enactment of the Act.

This intent of Congress regarding the limitation statute is indicated by the legislative proceedings culminating in the enactment of the Revenue Act of 1924. (*Binns v. U. S.*, 486, 495; *U. S. v. Whyel; Blake v. The National City Bank*, 90 U. S. 307; *Marx v. Hawthorne*, 148 U. S. 172.)

A. W. Gregg, Esq., General Counsel of the Bureau of Internal Revenue and legislative expert, who directed the drafting of this act, in explaining the purpose of section 278 to the Senate Finance Committee, said that it was "to keep this section from having any retroactive effect or to apply to things happening before its passage." He further said that its purpose was "to prevent the giving

of any retroactive effect to the provisions of this act. The taxes under prior acts stand on their own footing, and this applies only after the passage of this act."

The Senate finance committee, in its official publication entitled "Statement of Changes Made in the Revenue Act of 1921 by H. R. 6715, and the Reasons Therefor, March 5, 1924," at page 27, said with reference to section 278(e): "This subdivision prevents the extension of this section to assessments or proceedings already begun under the existing law." In another report of the Senate Committee on Finance, Report No. 398, p. 32, on the Internal Revenue Bill of 1924, it is stated regarding the purpose of Section 278(e) of that Bill, that:

> "This subdivision has been rewritten to make it clear that the section does not extend to assessments or distraint proceedings already barred by existing law, or to assessments or distraint proceedings already begun under the existing law."

In the same report it is stated regarding Section 278(d):

> "*In order to protect the taxpayer further*, a limitation of six years after the assessment of the tax has been placed upon proceedings in court and distraint for its collection. At the end of such period, the taxpayer is assured that his tax liability is finally determined." (Italics ours.)

The reports of committees of the House and Senate are regarded as expositive of the legislative intent as to the meaning of a statute. (*Binns v. U. S.*, 194 U. S. 486, 495; *U. S. v. Whyel.*)

The grammatical construction of Sections 277 and 278 and the separation of them into distinct sections, the one

fixing the definite statutory period of limitations in all cases, the other specifying the only exceptions from the force of the former, seems conclusive of the expression in the statute of the legislative intent, as will hereinafter be further established.

DISTINCTIONS BETWEEN SECTION 250(d) OF THE REVENUE ACT OF 1921 AND SECTIONS 277 AND 278 OF THE REVENUE ACT OF 1924.

It is conceded that Section 250(d) of the Revenue Act of 1921 did not prohibit the application of the common law rule authorizing waivers of limitation periods after the period had expired. Section 250(d) of the Revenue Act of 1921, however, was repealed by the Revenue Act of 1924 and Sections 277 and 278 were intended to apply to all cases. (*U. S. Whyel; Russell v. U. S.; Uncasville Mfg. Co. v. Commissioner;* Section 1100(a), Revenue Act of 1924—"The following parts of the Revenue Act of 1921 are repealed, to take effect (except as otherwise provided in this act) upon the enactment of this act, subject to the limitations provided in subdivisions (b) and (c). Title II (called 'Income Tax') as of January 1, 1924; * * * (b) The parts of the Revenue Act of 1921 which are repealed by this act shall (except as provided in sections 280 and 316 *and except as otherwise specifically provided in this act*) remain in force for the assessment and collection of all taxes imposed by such act. * * *").

Not only, as hereinbefore mentioned, was there such an important change in conditions as they existed on November 23, 1921 when the Revenue Act of 1921 was enacted and on June 2, 1924 when the Revenue Act of

1924 was enacted, which made it advisable to prescribe by specific statute all desirable law and rules regarding limitation periods and waivers, but there is such radical distinction between the construction of Sections 277 and 278 of the Revenue Act of 1924 and Section 250(d) of the Revenue Act of 1921 as to indicate that the legislature intended and actually did, by enacting Sections 277 and 278 of the Revenue Act of 1924, abrogate all common law rules as to waivers and provide by statute the law to be followed as to the extent and effect of the limitation period. There cannot be an effective and operative common law that is essentially different from a clearly expressed statute law. (*U. S. v. Matthews*, 173 U. S. 381; *Federal Mining & Smelting Co. v. Wittenberg* (Del.—1927, 138 Atl. 347).

In Section 250(d) of the Revenue Act of 1921 we find the statute reciting that the period of limitation for assessment and collection should be five years unless the Commissioner and the taxpayer consent in writing to a later determination, assessment and collection of the tax. The recital of the statutory period of limitation, and the authorization for acceptance of waivers, and the application of the statute to "determination, assessment and collection" are all confined in the same subdivision of Section 250 (250(d)) of the Revenue Act of 1921.

On June 2, 1924 Congress, in carrying out its intent to cover all cases by specific statute, to promote real repose in the assessment and collection of taxes, and to definitely fix beyond possibility of change, by taxpayer or government, the status of assessments made prior to June 2, 1924, enacted Sections 277 and 278 as part of the Revenue Act of 1924.

Section 277 prescribes a general period of limitation subject only to such *exceptions* as provided in Section 278 (and certain subdivisions of Sections 274 and 279 not material to this case). Section 277 is all-inclusive as establishing the limitation period permitting only as exceptions to its application those exceptions specified in Section 278. Its terms are as follows:

> Section 277. (a) "*Except* as provided in Section 278 * * *
>
> (2) The amount of income, excess-profits and war-profits taxes imposed by * * * the Revenue Act of 1916, the Revenue Act of 1917, the Revenue Act of 1918, and by any such Act as amended, shall be assessed within five years after the return was filed, *and no proceeding* in court for the collection of such taxes *shall be begun after the expiration of such period.*" (Italics ours.)

What are the exceptions to the strict application of Section 277? Section 278(a) provides that in cases of false and fraudulent returns or where no return was filed the period for assessment is extended indefinitely. Section 278(b) provides that in cases involving deductions for amortization, the period for assessment is extended indefinitely. Section 278(c) provides for waivers as follows:

> "Where both the Commissioner and the taxpayer have consented in writing to the assessment of the tax after the time prescribed in Section 277 for its assessment the tax may be assessed at any time prior to the expiration of the period agreed upon."

Section 278(d) provides for an extension of the period for collection of taxes assessed after June 2, 1924. (*Rus-*

sell v. U. S.) By these provisions every possible situation as to exceptions to the application of the general period of limitations for assessment and collection, as they apply to assessments made after June 2, 1924, has been provided for. *Then, in order to make clear beyond doubt its intent that those subdivisions of Section 278 should prescribe the only exceptions, and to remove any doubt that the absence of exceptions as to assessments made prior to June 2, 1924, was intentional and not mere oversight or with the idea that some other law or rule should apply, Congress enacted Section 278(e) to specifically express its intention that Section 278 should not be construed to "authorize the assessment of a tax or the collection thereof by distraint or by a proceeding in court if at the time of the enactment of this Act such assessment, distraint or proceeding was barred by the period of limitation then in existence."* (Sec. 278(e), Rev. Act of 1924.)

As explained in the Senate Finance Committee Report on the Revenue Bill of 1924, Section 278(e) was carefully worded and inserted to "make it clear that the section does not extend to assessments or distraint proceedings already barred by the existing law." (*Supra*, p. 22.)

Section 278 being a section of a statute containing exceptions or provisos to another section of the same statute, Section 278 must be strictly construed and it cannot take out of the general statute any case which does not fall within the terms of the exceptions specified. (*U. S. v. Dickson*, 15 Pet. 141; *Fed. Reserve Bank v. Webster*, 287 Fed. 579.)

The careful language employed in Section 278(e), the separation of Section 277 and 278, the one to provide for the general limitation periods, and the other to provide for the exceptions, and the direct declaration by Section 278(e) of the intent not to make any other exceptions than those specified and not to authorize the extension of the exceptions specified to matters barred at the time of the enactment of the Act, or to assessments made before June 2, 1924, and the legislative history of those sections, reflect a complete change from the intent and purpose of Section 250(d) of the Revenue Act of 1921 and preclude any application of this court's interpretation of the latter section as a proper interpretation of Sections 277 and 278 of the Revenue Act of 1924. The construction and effect to be given to Sections 277 and 278 must depend upon the wording and form of the sections themselves, from the legislative history of their enactment indicating the intent of Congress as to their purpose and meaning, and from the wording or declaration of meaning contained in sections *in pari materia* enacted in later Revenue Acts.

Section 278(e) of the Revenue Act of 1924 Restricted All Other Subdivisions of Section 278 From Application to Assessments Made Prior to June 2, 1924 Wherever Such Application Would Affect the Status of the Assessments.

EFFECT OF THE CASE OF RUSSELL V. U. S.

The question of the interpretation of Section 278 of the Revenue Act of 1924 first came before this Court in the case of *Russell v. U. S.*, 278 U. S. 181. In that case a 1918 tax was assessed on March 30, 1924. The

government contended that under Section 278(d) of the Revenue Act of 1924 it had six years from assessment, or until March, 1930, for collection. This Court concluded that Section 278(e) restricted Section 278(d) from application to assessments made prior to June 2, 1924. Although this Court had before it only the question of whether Section 278(e) restricted Section 278(d) from application to assessments made prior to June 2, 1924, the date of enactment of the Revenue Act of 1924, the Court's language in interpreting the meaning of Section 278 was general in nature and if literally construed supports the appellant's position in this proceeding that Section 278(e) restricts Section 278(c), as well as Section 278(d) from application to assessments made prior to June 2, 1924. In the Russell case, this Court, after pointing out that the Revenue Act of 1924 created a radical distinction between assessments prior to June 2, 1924, and later ones,[1] stated:

> "Paragraph (e), (2), of Sec. 278 expressly directs that that section shall not affect any assessment made before June 2, 1924. Counsel for the United States maintain that to extend the time for bringing suit thereon does not 'affect' an assessment within the

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[1] When the Revenue Act of 1924 passed many parties were liable for taxes imposed by former acts—1921, 1918, etc.; against some there were assessments; others had not been assessed. It made provision concerning taxes thereafter to accrue; also, for those already due. It distinguished between existing assessments and those which were to follow. It established a board of tax appeals and gave the right of appeal thereto whenever thereafter the commissioner should propose to assess for deficiency. It thus created a radical distinction between assessments prior to June 2, 1924, and later ones which, generally at least, if objected to, could not be made without assent of the board. To secure proper action by the board might require considerable time, and this was provided for by extending the limitation to six years after assessment. But the taxpayer was afforded protection against any improper action by the Commissioner through an appeal before any assessment could be actually imposed—a new and valuable right.

meaning of the paragraph. We cannot agree. Some real force must be given to the words used—they were not employed without definite purpose. The rather obvious design, we think, was to deprive Sec. 278 of any possible application to cases where assessment had been made prior to June 2, 1924.

The legislative history of the Act of 1924 lends support to the conclusion which we have reached. The changes introduced into the Act of 1926 cannot authorize construction of the earlier one not consonant with the language there employed."

Hereinbefore (page 14), we have set forth a quotation from this Court's decision in the case of *Burnet v. Chicago Rwy. Equipment Co.*, wherein this Court explained that the Russell case involved only the question of whether Section 278(e) restricted Section 278(d) and in specifically reserving decision as to whether Section 278(e) restricted Section 278(c) this Court intimated certain possible objections to such a construction.

Effect of the Case of Uncasville Mfg. Co. v. Commissioner.

The very question so reserved for decision by this Court arose in the case of *Uncasville Mfg. Co. v. Commissioner* (2nd Circuit), 55 Fed. (2d) 893, and the Circuit Court in deciding that Section 278(e) restricted the whole of Section 278 from allowing the assessment or collection of a tax barred by existing limitations on June 2 1924, discussed and explained away the possible objections to such an interpretation intimated by this Court in the *Burnet v. Chicago Rwy. Equipment Co.* case. Although we understand that failure to grant

petition for *certiorari* is not necessarily affirmance by this Court of a decision of another Court, we do feel that it is favorably significant that this Court denied petition for *certiorari* in the *Uncasville* case.

In the instant proceeding the Circuit Court of Appeals for the Ninth Circuit distinguished the *Uncasville Mfg. Co.* case on the ground that in the *Uncasville* case the tax had not yet been assessed while in the instant case the tax had been assessed prior to June 2, 1924. We do not believe this distinction is material. There is but one correct tax which is due upon filing of the return and represents a liability after that date. Although deficiencies might not be determined until a later date and might not be payable until after they are determined, they were due when the return was filed, bear interest from that date (under Revenue Acts after 1921 Act), and represent liabilities as of the date they were due. The assessment marks the time the tax becomes payable when collection is to be made through the regular channels. That it does not fix the date of liability is evident from the provisions of the Statute authorizing the enforcement of collection by suit by proceeding in Court without assessment. (Sec. 278, Revenue Act of 1924.)

Effect of the Case of McDonnell v. U. S.

The Court of Claims in the case of *McDonnell v. U. S.*, 59 Fed (2d) 290, now pending before this Court on writ of *certiorari*, expressed its disapproval of the decision in the *Uncasville* case. The Court of Claims pointed out that under the Revenue Act of 1921 the taxpayer could waive the Statute of Limitations after the enactment of the Revenue Act of 1921 even though the

statutory period for assessment and collection had expired before the enactment of that Act. The Court of Claims then continued:

> "In the Uncasville Mfg. Company case the Court construed section 278(e) of the Revenue Act of 1924 as a *prohibition* upon the giving of a waiver by a taxpayer and the acceptance thereof by the Commissioner. We are unable to find any provision in the 1924 Revenue Act which precludes a taxpayer from voluntarily waiving the benefits of the statute of limitation, nor do we find anything in such act prohibiting the Commissioner's acceptance of such waiver. This view seems not to have been presented in the Uncasville Mfg. Company case, *supra;* it was not commented upon by the court in its opinion. The court merely stated that subdivision (e) of section 278 of the Revenue Act of 1924 limits the preceding subdivision (c) of section 278 so that subdivision (c) does not *authorize* the extension of time for assessment by a waiver executed after the enactment of the Revenue Act of 1924 where the time for assessment expired prior to the enactment of that act. In Burnet v. Chicago Railway Equipment Co., *supra,* in footnote 5, page 300 of 282 U. S., 51 S. Ct. 137, 139, 75 L. Ed. 349, to the statement in the opinion that 'We need not determine whether respondent is correct in assuming that section 278(e) qualifies section 278(c) in respect to waivers on assessment of taxes barred prior to June 2, 1924,' it is stated that 'Subdivision (e) cannot be said to qualify every other subdivision in section 278. Nothing indicates an intention to have it limit the effect of section 278(a), 26 U. S. C. A., Sec. 1058, which permits assessment to be made or suit to be brought at any time in the case of a false or fraudu-

> lent return or a faiure to file any return. * * * *Nor is there any indication that it should qualify subsection (c) which provides for the giving of waivers.'* (Italics ours.) We conclude, therefore, that the Revenue Act of 1924 does not preclude a taxpayer from waiving the benefit of the statute of limitation, and that a waiver given after the enactment of the Revenue Act of 1924, in a case where the statutory limitation had expired prior thereto, and before February 26, 1926, is valid."

Since the Court did not in its opinion make an analysis of Sections 277 and 278 of the Revenue Act of 1924, to determine exactly how those sections were to be construed to give to them the effect intended by the legislature at the time of their enactment, we must conclude that the Court of Claims predicated its decision principally upon this Court's intimations in the *Burnet v. Chicago Rwy. Equipment Co.* case.

In the succeeding pages of this brief we do not intend to direct specific rebuttal to the decision of the Court of Claims in the *McDonnel* case, but intend to accomplish a general rebuttal of that decision by supporting the *Uncasville Mfg. Co.* case and by showing a purposeful amendment by the Revenue Act of 1924 of the Revenue Act of 1921 regarding the validity and effect of waivers, and the legislative intent that such use of waivers given after June 2, 1924, was not to affect the status of an assessment made and barred from collection prior to June 2, 1924, the date of enactment of the Act, and could not extend the limitation period in such a case.

Section 278(e) Does Not Restrict Section 278(a) From Application to Assessments Made Prior to June 2, 1924 Since the Application of Section 278(a) to Those Classes of Cases Referred to in the Section, Would Not Affect an Assessment Made Prior to June 2, 1924.

Reviewing particularly the possible objections by this Court to an affirmative answer to the question involved in this proceeding, as intimated by this Court in the *Burnet v. Chicago Rwy. Equipment Co.* case as aforesaid and following generally the replies made thereto by the Circuit Court in the *Uncasville* case, we respectfully submit our conclusions as to the disposition of those objections as follows:

Subdivision (a) of Section 278 of the Revenue Act of 1924 extends indefinitely the time for all assessments, and extends the time for collections to the period provided for in subdivision (d), where the return was fraudulent, or where no return was filed. *U. S. v. Updike*, 281 U. S. 490; *U. S. v. Lazenby*, 5 Fed. (2d) 827. Under Section 250(d) of the Revenue Act of 1921 the tax in such cases might be *determined, assessed and collected*, at any time. It is obvious that as to these cases, where assessments are made either under Section 250(d) of the Revenue Act of 1921 or Section 278(a) of the Revenue Act of 1924, Section 278(e) could not be applicable because such assessment and collection were not barred on June 2, 1924.

DEFINITION OF TERM "AFFECT" AS USED IN SECTION 278(e) (2).

We have just stated that where, in this class of cases, an assessment had been made prior to June 2, 1924, the time for collection would be the time provided for in Section 278(d) Revenue Act of 1924. (*U. S. v. Updike*, 281 U. S. 490.) This conclusion is not in violation of Section 278(e) (2) of the Revenue Act of 1924 prohibiting the application of the whole of said Section 278 from *affecting* assessments made prior to June 2, 1924. In defining the word "affect" to give it its intended meaning in this Section, it must be observed that this Section with Section 277 is a Statute of Limitations enacted for the purpose of promoting repose insofar as pending tax assessments are concerned. (*Spear & Co. v. Heiner*, 34 Fed. (2d) 795; *Whyel v. U. S.; Russell v. U. S.*) If Section 278(e) (2) were construed to prevent the application of Section 278(d) or (a), or both (d) and (a) together in that class of cases referred to in Section 278(a), to assessments made prior to June 2, 1924, there would have been no period of limitation for the collection of such a tax. As stated by this Court in the *Updike* case—"In such case, to allow an indefinite time for proceeding to collect the tax would be out of harmony with the obvious policy of the Act to promote respose by fixing a definite period after assessment." Since this limitation statute was enacted strictly for the taxpayer's benefit, it must be concluded that the word "affect" as used in

Section 278(e) (2) of the Revenue Act of 1924 refers only to any proceeding or provision which might by extending existing limitation periods, or otherwise, apply to the taxpayer's detriment or against his interests. Certainly the establishment of a six year period for collection in place of an indefinite unlimited period for collection does not affect the taxpayer detrimentally, but does inure to his benefit.

Section 278(e), therefore, does not apply to or restrict Section 278(a) because, first, the collection of any tax assessed in such cases was not barred on June 2, 1924 (Section 250(d) of the Revenue Act of 1921 permitting the collection of such assessment "at any time"), and, second, the combined effect of Section 278(a) and 278(d) to such assessments in such cases does not "affect" the assessments made within the meaning of that word as used in Section 278(e) (2).

Section 278(e) Does Not Restrict Section 278(b) From Application to Assessments Made Prior to June 2, 1924 Since the Application of Section 278(b) to Those Classes of Cases Referred to in the Section, Would Not Affect an Assessment Made Prior to June 2, 1924.

Subdivision (d) of Section 278 of the Revenue Act of 1924 refers to taxes resulting from a change in deductions taken for amortization of war investments, and contains the same provisions as to limitations upon assessment and collection of such taxes as contained in

Section 278(a). Likewise, in this class of cases there was contained in Section 250(d) of the Revenue Act of 1921, the provision that any taxes might be determined, assessed and collected at any time. There is the same situation here as regards Section 278(a) so we must conclude likewise, that Section 278(e) therefore does not apply to or restrict Section 278(b) because, first, the collection of any tax assessed in such cases was not barred on June 2, 1924 (Section 250(d) of the Revenue Act of 1921 permitting the collection of such assessment "at any time"), and, second, the combined effect of sections 278(b) and 278(d) to such assessments in such cases does not "affect" the assessments made within the meaning of that word as used in Section 278(e) (2).

Section 278(e) Does Restrict Section 278(d) From Application to Assessments Made Prior to June 2, 1924 Because to EXTEND the Limitation Period for Collection of a Tax Assessed Before June 2, 1924 Affects Such Assessment in Violation of Section 278(e) (2).

We have already pointed out that under this Court's decision in the *Russell* case, Section 278(e) of the Revenue Act of 1924 prohibits the application of Section 278(d) to assessments made prior to June 2, 1924, because to extend the limitation period for collection of a tax assessed before June 2, 1924 affects such assessment in violation of Section 278(e) (2).

Section 278(e) Does Restrict Section 278(c) From Application to Assessments Made Prior to June 2, 1924 Because to Authorize the Extension of a Period of Limitation for Collection Already Expired as to Such an Assessment Would Not Only Affect Such an Assessment in Violation of Section 278(e) (2) but Would Also Authorize the Collection of a Barred Tax in Violation of Section 278(e) (1).

In the *Uncasville* case the Circuit Court held that Section 278(e) so restricted Section 278(c) as to prevent it from authorizing the revivor by waiver given after June 2, 1924, of the right to assess, where the limitation period for assessment had expired prior to June 2, 1924. Since under this Court's decision in the *Stange* case the term "assessment" as used in Section 278(c) of the Revenue Act of 1924 is synonymous with "collection," (*Hind v. Commissioner*, 52 Fed. (2d) 1075; *Washington Coal & Coke Co. v. Heiner*, 42 Fed. (2d) 681, aff'd 55 Fed. (2d) 229—note also the waiver given by the Pacific Coast Steel Co. on December 9, 1925 was a waiver of the period of limitation on *assessment*), the decision in the *Uncasville* case would be applicable to this proceeding in that its result would prevent the revivor by waiver given after June 2, 1924, of the right to collect an assessment made and barred from collection before June 2, 1924. This should be the proper conclusion since no plain purpose to change or to authorize the change of the status of the claim against the petitioners as it existed just before June 2, 1924, can be spelled out of the words in Section 278 or otherwise. (*Russell v. U. S.*)

In the *Russell* case this Court concluded that Section 278(e) prohibited the extension by statute—Section 278(d), of the period of limitation for collection of an assessment made before June 2, 1924. In this proceeding, the tax assessed on February 9, 1923, was uncollectible by reason of the bar of the limitations, after April 1, 1924. Since Congress intended that the status of assessments made prior to June 2, 1924, should not be disturbed by the Revenue Act of 1924, it must be conceded under the *Russell* case that the provisions of that Act could not extend the period for collection of that assessment. (See legislative history of Sections 277 and 278, *supra*, p. 20.)

In our discussion of the legislative history of Sections 277 and 278 we concluded *that, as was the intent of Congress, they covered all cases involving periods of limitation and waivers,* and any case which did not come within the *exceptions* of Section 278 must be controlled by the strict mandatory provisions of Section 277. As we have also hereinbefore concluded, one of the exceptions provided for by Section 278 is the class of cases where waivers of the limitation period are filed (Section 278(c)), but that exception is restricted in its application from those cases *excluded from the operation of Section 278* by Section 278(e).

In this proceeding therefore which comes directly within the provision of Sections 278(e) (1) and (2), the giving of waivers could not be authorized by Section 278(c) and the strict provision of Section 277 must control. In this case the collection was barred on June 2, 1924, (Section 278(e) (1)) and the tax in question

was assessed prior to June 2, 1924 (Section 278(e) (2)). Because of this situation this Court must conclude that the statute, (Section 278) could not extend the period for collection (*Russell* case). But the Government contends that since the giving of the December 9, 1925 waiver is a voluntary act it is not the statute but the voluntary act which extends the limitation period. However, since the only authority for the validity of the waiver is Section 278(c), *is it not the force of the statute which authorizes* the extension of the limitations period, and thereby authorizes the collection of the tax after the period specified in Section 277? If the waiver of December 9, 1925 is given validity and effect by Section 278(c) is it not true that that Section, Section 278, is thus authorizing the collection of a tax which was assessed before June 2, 1924 and barred from collection at the time of the enactment of the Revenue Act of 1924 by the period of limitation then in existence? And is this not in direct violation of, first, Section 278(e) (1) which specifies that *Section 278 shall not authorize* the collection of a tax barred at the time of enactment of the Revenue Act of 1924?, and, second, Section 278(e) (2) which specifies that *Section 278 shall not affect* by extending the limitation period for collection, any assessment made prior to the date of enactment of the Revenue Act of 1924?

Congress was aware of the fact that the giving of a waiver was not always a "voluntary" act. No taxpayer desires to indefinitely defer the final disposition of his tax affairs. Congress, when it provided in the Revenue Act of 1924 for the creation of the United States Board

of Tax Appeals was aware of the practice of the Bureau of Internal Revenue to levy large arbitrary assessments in cases where the Statute of Limitations was about to expire and where its request for waiver was denied. Congress must also have been aware that this practice was vicious and in many cases caused considerable loss to taxpayers, sometimes causing complete destruction of business ventures, and that the giving of a waiver might be the only alternative in order to avoid such irretrievable loss and hardship. Since Congress was aware of this situation it seems only logical that it would have provided in a statute enacted for the benefit of the taxpayer and for the purpose of promoting repose (*Spear & Co. v. Heiner*) that in any cases where the Statute of Limitations had already expired there was to be no revivor of the rights so barred. (In this connection note the tenor of discussion between A. W. Gregg then Solicitor of Internal Revenue and members of the Ways and Means Committee, House of Representatives, Report of Hearings, Revenue Revision 1925, pp. 1007, 1008; note also limitation provisions in subsequent Acts hereinafter to be referred to.)

ANALYSIS OF TERMINOGY EMPLOYED IN SECTION 278(e).

The conclusion that Section 278(e) restricts Section 278(c) and restricts any authorization of extension of the limitation period in cases involving assessments made prior to June 2, 1924 or a right of collection barred on that date is consistent with the terminology employed in Section 278. This is particularly true if the rule is followed, that if possible, effect should be given to every

clause and part of the statute, and the words used should be given their known and ordinary signification. (*D. Ginsberg & Son v. Popkin,* 285 U. S. 204; *Old Colony R. Co. v. Com.,* 284 U. S. 552). Section 278(e) provides that *"This section"* (which must in the ordinary signification of such a term indicate Section 278, the section of which the paragraph containing the term is a subdivision) "shall not" (the use of the term "shall" expressing command rather than direction) "(1) *authorize* the assessment of a tax or the collection thereof by distraint, or by a proceeding in Court if at the time of the enactment of this Act, such assessment, distraint, or proceeding was barred by the period of limitation then in existence." (There is no ambiguity in this terminology. If Section 277(a) (2) reflects the only law specifying the periods of limitation for collection of a 1917 tax, and if Section 278 reflects the only law relating to *exceptions* from the applicability of Section 277(a) (2) either by reason of waivers or otherwise, and if Section 278 is therefore the only section which might authorize the collection of the tax by distraint or other proceeding in a case where the collection was barred before June 2, 1924, and is barred by the provisions of Section 277(a) (2), then the above provision of Section 278(e) restricts the only section which might authorize the collection in such a case; because of such restriction there is no law or authority under which the collection after June 2, 1924 of that tax barred from collection before that date might be legal or valid, and any proceeding instituted to enforce such collection would be in direct violation of Section 277(a) (2).) And Section 278(e) further provides,—"or, (2) *affect any assessment made,* or distraint

or proceeding in court begun, *before the enactment of this Act.*" (There is no ambiguity in this terminology. We have hereinbefore concluded that the term "affect" means "to extend the period of collection of" or "to authorize the extension of the period of collection of". Therefore, this provision would have the same application to this proceeding, where the assessment of the 1917 tax was made in February 1923 and was barred from collection after April 1, 1924, as Section 278(e) (1).) So, if effect is to be given to the provisions of Section 278(e) (1) and to the ordinary signification of the meaning of those provisions, it must be concluded that because that section restricts from authorizing the extension of the period for collection of the 1917 tax assessed against the Pacific Coast Steel Company in February 1923, the only provision or rule of law which might possibly authorize such an extension, the bar of the statute of limitations imposed by Section 277(a) (2) against the collection of that tax cannot be removed, and any collection of that tax after June 2, 1924 constitutes an overpayment which is refundable.

In view of this discussion the only logical conclusion which can be drawn is the conclusion reached in the *Uncasville Mfg. Company* case, that where the validity of a tax assessment or collection depended upon a waiver given after June 2, 1924, that waiver to be valid must come within the authorization of Section 278(c) which is the only law regulating waivers in effect after June 2, 1924; and that because subdivision (e) of Section 278 confines subdivision (c) to cases where the assessment or collection was not barred on June 2, 1924, a waiver given after June 2, 1924 extending the period for collection of

a tax which was assessed before June 2, 1924 and the collection of which was barred before June 2, 1924, cannot effect a waiver of the right to collect since such a waiver does not come within the authorization of Section 278(c).

In Cases Where Assessment Was Made and Barred From Collection Prior to June 2, 1924, Section 278(e) and (c) May Be Construed as Meaning That the Limitations Period Could Be Extended Only by a Waiver Given Before the Enactment of the Revenue Act of 1924.

EFFECT OF CHANGES IN SECTION 278(c) IN LATER REVENUE ACTS.

In substantiation of the asserted interpretation of Sections 278(e) and 278(c) of the Revenue Act of 1924, we respectfully call attention to the reenactment of those sections in subsequent revenue acts—the Revenue Act of 1926, the Revenue Act of 1928 and the Revenue Act of 1932. In the case of *Russell v. U. S.*, the Court refused to accept the changes introduced in the Revenue Act of 1926 in Section 278(d) thereof as declaratory of the intended meaning of Section 278(d) of the Revenue Act of 1924. The Court found that those changes made in Section 278(d) of the Revenue Act of 1926 were not consonant with the language employed in Section 278(d) of the Revenue Act of 1924. A mere comparison of the two sections will convince that the sections are not in *pari materia*. Where, however, the terms used in a subsequent act on the same subject are consonant with a construction which may be placed upon terms used in the earlier act,

the latter act is to be deemed a clarification of or declaratory of the meaning intended as the meaning of the earlier act.

Following the rule as stated in the case of *Alexander v. Alexandria*, 5 Cranch, 7, 3 L. Ed. 19—"It is to be observed that acts in *pari materia* are to be construed together as forming one act. If, in a subsequent clause of the same act, provisions are introduced, which show the sense in which the Legislature employed doubtful phrases previously used, that sense is to be adopted in construing those phrases. Consequently, if a subsequent act on the same subject affords complete demonstration of the legislative sense of its own language, the rule which has been stated, requiring that the subsequent should be incorporated into the foregoing act, is a direction to courts in expounding the provisions of the law." So, if it can be gathered from a subsequent statute in *pari materia* what meaning the legislature attached to the words of a former statute, they will amount to a legislative declaration of its meaning and will govern the construction of the first statute. (*Joy Floral Company v. Commissioner.*) By invoking this rule in an effort to determine the meaning of Section 278(c) of the Revenue Act of 1924, we disclose this situation. Section 278(c) of the Revenue Act of 1926 is an exact reenactment of Section 278(c) of the Revenue Act of 1924. The same language being employed, the acts can be construed to have intended the same meaning. The Revenue Act of 1926 was followed by the Revenue Act of 1928, section 506 of which reads as follows:

"SEC. 506. WAIVERS AFTER EXPIRATION OF PERIOD OF LIMITATION.

(a) Section 278(c) and (d) of the Revenue Act of 1926 are amended to read as follows:

'(c) Where before the expiration of the time prescribed in section 277 for the assessment of the tax, both the Commissioner and the taxpayer have consented in writing to its assessment after such time, the tax may be assessed at any time prior to the expiration of the period agreed upon. The period so agreed upon may be extended by subsequent agreements in writing made before the expiration of the period previously agreed upon. * * *'"

It is to be noted, however, that subdivision (c) of Section 506 reserves the above amendment from affecting the validity of waivers made prior to the enactment of the Revenue Act of 1928 and adds that the validity of such waivers shall be determined according to the law in existence at the time such waivers were filed. If, however, Section 278(c), as rephrased under Section 506 of the Revenue Act of 1928, declares the proper interpretation intended by Section 278(c) of the Revenue Acts of 1924 and 1926 as originally enacted, the amendment would not affect the validity of the waivers made prior to the enactment of the Revenue Act of 1928. (*Joy Floral Company v. Commissioner; Panther Rubber Mfg. Co. v. Commissioner,* 45 Fed. (2d) 314; *Wetherell Bros. Co. v. White,* 46 Fed. (2d) 83; *Spear Company v. Heiner,* 34 Fed. (2d) 795; *Pictorial Printing Co. v. Commissioner,* 38 Fed.

(2d) 563; *Columbian Iron Works v. Brock*, 38 Fed. (2d) 816.)

If Section 278(c) as contained in Section 506 of the Revenue Act of 1928 declares the proper interpretation of Section 278(c) as originally enacted in the Revenue Act of 1926, it must necessarily declare the proper interpretation of Section 278(c) of the Revenue Act of 1924, since Section 278(c) as originally enacted in both the Revenue Acts of 1924 and 1926 were identical in language.

We concede that this Court's decision in the *Burnet v. Chicago Ry. Equip. Co.* case holds that an assessment waiver given after the limitation period had expired was valid and effective to extend the limitation period. But in that case the original period of limitations had not expired prior to the enactment of the 1924 Act and Section 278(e) therefore did not apply. We submit that in a case where as in this proceeding, the assessment was made prior to, and the period for collection had expired prior to, the date of enactment of the 1924 Act, Section 278(e) would apply and Section 278(c) could not authorize the extension of the period by a waiver given after the statute of limitations had expired.

The construction of Section 278(c) must give force and effect to the restrictions imposed by Section 278(e) in every case to which Section 278(e) applies. It is entirely consistent that in other cases, free from the restrictions imposed by Section 278(e), Section 278(c) of the Revenue Act of 1924 should, as held in the *Burnet v. Chicago Ry. Equip. Co.* case, authorize extension by waivers even though the waivers be given after the statute has expired.

Effect of Changes in Section 278(e) in Later Revenue Acts.

In this respect we wish also to point out changes in Section 278(e) as enacted in the Revenue Act of 1926. Section 278(e) of the Revenue Act of 1926, though rephrased, is practically the same as Section 278(e) of the Revenue Act of 1924 excepting that it adds a provision which gives it the effect of declaring that nothing in Section 278 shall authorize the collection of a tax barred at the date of the enactment of the act *unless prior to the enactment of the act the Commissioner and the taxpayer* agreed in writing thereto. (*Holmes & Brewsters Federal Tax Appeals*, 1927 ed., page 42—"Subdivision (e) was a rephrasing of Subdivision (e) of the 1924 law * * *.) In this proceeding there was no waiver filed prior to the enactment of the Revenue Act of 1924 which authorized the collection of the 1917 tax after that date, June 2, 1924.

As we have hereinbefore concluded from an exhaustive analysis of the legislative intent of Section 278(e) of the Revenue Act of 1924, the provision contained in Section 278(e) of the Revenue Act of 1926 that any waiver to be effective must have been entered into before the enactment of the act, particularly as it affects assessments made prior to June 2, 1924, is consonant with the construction to be given Section 278(e) of the Revenue Act of 1924 and might, therefore, be stated to be declaratory of the meaning intended by Section 278(e) of the Revenue Act of 1924.

If this construction applies, then the waiver given by the Pacific Coast Steel Company in 1925 could not be

effective to revive the government's right to collect the assessment made in 1923, and it would undoubtedly be true that Section 278(e) thus construed would prohibit Section 278(c) from giving to the waiver any valid effect. The situation would be exactly similar to that existing in the case of *Jacob Bros. Co. v. Commissioner*, 19 B. T. A. 315, where the waiver was given after the enactment of the Revenue Act of 1926 to extend the period of collection of a tax, the collection of which was barred prior to the enactment of the Revenue Act of 1926. The Board in its decision in the case stated:

> "At the time of the enactment of the Revenue Act of 1926 the collection of the tax was already barred by the statutory period of limitation properly applicable thereto and the Commissioner and the taxpayer did not agree in writing prior to the enactment of the Revenue Act of 1926 to any extension of time for the collection of the tax after the expiration of the statutory period. Subdivision (e) of section 278 is a limitation upon all the other provisions of section 278 of the Revenue Act of 1926, and under that subdivision any consent or agreement by the Commissioner and the taxpayer with respect to the assessment or collection of the tax must be made prior to the enactment of that Act in order to have effect, provided at the time of the enactment of the Act the assessment or collection was barred."

(See, also, to same effect: *James & Holmstrom Piano Co.*, 19 B. T. A. 322; *Wetherell Bros. Co. v. White*, 46 Fed. (2) 83; *F. A. Gillespie v. Commissioner*, 20 B. T. A. 1068, 1079.)

In a very recent case decided January 3, 1933 by the United States Circuit Court of Appeals for the First Cir-

cuit, *Commissioner v. Northern Coal Company*, paragraph 9050., C. C. H. Standard Federal Tax Service, 1933, it was held that a waiver given after the period of limitations had expired and subsequent to the passage of the 1926 Act and prior to the 1928 Act is ineffective because Section 1106 of the 1926 Act not only barred the remedy but extinguished the liability. In this case the decision ultimately rested upon the application of Section 1106. However, the Court in analyzing the reason for that section indicated that under prior Revenue Acts, at least the Acts of 1924 and 1926, waivers to be effective must have been executed before the period of limitation expired, and that the provisions to this effect inserted in the later acts indicated "one obvious purpose of Congress, running through the Acts of 1926, Sections 277, 278, and 1928, Sections 275, 506, continued in the Act of 1932, Sections 275, 276, was to speed up the collection of taxes, to abolish the granting of extensions after the expiration of the period of limitation for the assessment of taxes, and definitely to prohibit the practice of collection by distraint after the limitation of the period for collection had expired." The Circuit Court in the case before it was especially interested in the Revenue Acts of 1926 and 1928. Its statement just quoted applies as well to the purpose intended by Sections 277 and 278 of the Revenue Act of 1924 as hereinbefore discussed.

We respectfully submit that in view of the legislative history of the enactment of the various sections regarding the statutory period for limitations commencing with the Revenue Act of 1924, and the obvious endeavors of Congress to import to those limitation provisions a true promotion of repose from tax levies involving matters which

occurred many years ago, and to give to the taxpayer assurance or security from the imposition of almost forgotten burdens against which the statute of limitations had already expired, this Court should conclude that Section 278(e) of the Revenue Act of 1924 so restricts Section 278(c) that the latter section could not authorize waivers which would be effective to revive in the government the right to collect an assessment made prior to June 2, 1924, the period for collection of which had expired prior to June 2, 1924.

Alternative Contention Predicated Upon the Proposition That There Is a Well Recognized Distinction Between Assessment and Collection Which Must Be Recognized in Construing the Meaning of Section 278 of the Revenue Act of 1924.

There is another construction of Sections 278(e) and 278(c) of the Revenue Act of 1924 which we feel might be tenable in support of the proposition that Section 278 prohibits a reviver of the right to collect an assessment made before June 2, 1924 where the right of collection was barred before that date. As we have hereinbefore pointed out, Congress intended that the only law relating to the statutory period of limitation on assessment and collection should be the law as it was contained in Sections 277 and 278 of the Revenue Act of 1924. In Section 250(d) of the Revenue Act of 1921, all provisions regarding the period of limitations referred to the time for "determination, assessment and collection" of the tax. Section 277 (a)(2) of the Revenue Act of 1924 prescribed definitely the period within which taxes under prior revenue acts should be assessed and collected. Sec-

tion 278(c) provides for waivers for "assessment" only. Section 278(d) provides for the "collection" of the tax "where the assessment of the tax is made." In view of the fact that the terms "assessment" and "collection" were used conjunctively in the Revenue Act of 1921, Section 250(d), and were both used in Section 277 of the Revenue Act of 1924, and were used independently in different subdivisions of Section 278, we believe that the use of the word "assessment" alone in Section 278(c) of the Revenue Act of 1924 was intentional and further expressive of the intent of Congress that any tax barred from collection on June 2, 1924 should remain barred. (*U. S. v. Whyel.*) It should also be noted that Section 250(d) of the Revenue Act of 1921 and Section 277(a)(2) of the Revenue Act of 1924 provided the same period of limitation for both assessment and collection, whereas Section 278(d) of the Revenue Act of 1924 provided for a different period of limitation for collection than for assessment.

There Was No Necessity for Collection Waivers After June 2, 1924 in View of the Intention of the Legislature That Assessments Made Before June 2, 1924 Should Not Be Affected by the Revenue Act of 1924, and in View of the Fact That Under the 1924 Revenue Act the Government Is Allowed Six Years After Assessment for Collection of Assessments Made After June 2, 1924.

It is possible that under authority of the case of *Stange v. U. S.*, 282 U. S. 270, Section 278(c) might be construed as authorizing the giving of waivers extending the

time for collection as well as for assessment. In the Stange case, however, the Court, although construing the use of the term "assessment" in a waiver as meaning collection as well as assessment, did state that its decision in that regard did not mean that the distinctions between assessment and collection were to be disregarded but merely that the employment of a single term comprehended both steps. It therefore does not necessarily imply that the use of the word "assessment" in Section 278(c) comprehends both assessment and collection. We have hereinbefore pointed out that it was the intent of the legislature that Section 278(e) should prohibit the application of the whole of Section 278 to assessments made before June 2, 1924. That being true, the only limitation periods applicable to assessments made prior to June 2, 1924 are those specified in Section 277, and if under that section (or Section 250(d) of the Revenue Act of 1921) the collection of an assessment was barred prior to June 2, 1924, nothing in the Revenue Act of 1924, or any other law or rule, could authorize a reviver of the government's right to collect. This, then, confines the provisions of Section 278(c) to assessments made after June 2, 1924, or in other words, Section 278(e) restricts Section 278(c) from authorizing the collection of taxes already assessed, and restricts it further from authorizing waivers for collection. By this restriction, therefore, Section 278(c) can authorize waivers of the period of limitation for assessment only.

Under this construction, the wording of Section 278(c) can be justified. By virtue of the provisions of Section 278(d) there is allowed for collection a period of six years after assessment in all cases where assessment is made after June 2, 1924. (*Russell v. U. S.*) Obviously, therefore, where the statute suffices to authorize the extension by waiver of the period of limitations on assessment, it need not provide for waivers for collection, since as to collection the government has six years after assessment (on assessments made after June 2, 1924—*Russell v. U. S.*) within which to collect. For this reason, Section 278(c) was so worded as to authorize waivers for assessment only. It makes no mention of collection. Such omission was undoubtedly deliberate since, as we have seen, the legislature did not intend Section 278(c) to apply to assessments made prior to June 2, 1924, and as to assessments after June 2, 1924, an extension of the time for the assessment automatically extended the six year period after assessment for collection provided for in Section 278(d).

As stated in the case of *Sunshine Cloak & Suit Co.*, 10 B. T. A. 971, 977:

> "In the 1924 Revenue Act Congress provided in effect that after an assessment had been timely made, the tax could be collected within six years thereafter. It contained no exception with respect to agreements or consents for any period for collection. We cannot add an exception omitted in the statute. Armour Packing Co. v. U. S., 209 U. S. 56; Yturbide v. U. S., 22 How. 290."

Rephrasing of Section 278(d) and (e) in Subsequent Revenue Acts and Re-enactment in Similar Form and Wording of Section 278(c) in Subsequent Revenue Acts Indicate That Section 278(c) of the Revenue Act of 1924 Was Intended to Authorize Waivers of the Period of Limitation on Assessment Only.

We can find further substantiation in support of our contention that it was not intended by the Revenue Act of 1924 that the right of collection which had expired prior to June 2, 1924, might be revived by waivers given after that date, and further that it was not intended that Section 278(c) should authorize any waiver other than an assessment waiver. Section 278(c) of the Revenue Act of 1924 is reenacted without change as Section 278(c) of the Revenue Act of 1926. Section 506 of the Revenue Act of 1926 amended Section 278(c) of the Revenue Act of 1926, but in the amended section the legislature still confined that section to the authorization of waivers for assessment only, the only amendment being to provide that the waivers to be valid must have been given before the expiration of the limitation period. As the reenactment of this section has reflected a consistent purpose of Congress to limit its application to the authorization of waivers for assessment only, we feel that any interpretation of Section 278(c) of the Revenue Act of 1924 should limit it to that purpose. If it can be gathered from a subsequent statute *in pari materia* what meaning the legislature attached to the words of a former statute, they will amount to a legislative declaration of its meaning and will govern the construction of the first statute. (*Joy Floral Co. v. Commissioner; Alexander v. Alexandria*, 5 Cranch. 7, 3 L. Ed. 19). Not only did Congress refuse to change the construction of Section 278(c) in

subsequent acts but it made provision in Sections 278(d) and (e) for extending the period of limitations on *collection* indicating further that Section 278(c) referred to *assessments* only.

In view of the fact that Sections 278(d) and (e) in the Revenue Act of 1926 and as amended by Section 506 of the Revenue Act of 1928 enacted new provisions relating to the extension by waiver of the limitation period for collection, and that there were no similar provisions in the Revenue Act of 1924, we are forced to conclude that the insertion of these new provisions in the 1926 Act was for the purpose of either enacting new law, or supplying an omission in an earlier Act. The phraseology of the sections as enacted in the 1926 Act are so inconsistent with the provisions of the former Act that it is impossible to infer that the later Act was intended as declaratory of the meaning of the former Act. The terms of a later Act cannot be read into an earlier Act where not consonant with the language used in the earlier Act. (*Russell v. U. S.*)

We respectfully submit that the legislative history of the enactment of Sections 277 and 278 of the Revenue Act of 1924 which indicates an intention not to extend limitation periods for collections of assessments made and barred before June 2, 1924, the clear and unambiguous terminology of Section 278(c) to the effect that nothing in the section should authorize the collection of such a tax, the specific use of the word "assessment" in Section 278(c) when considered with the manner in which the terms "assessment" and "collection" were used in other sections, the retention of Section 278(c) in identical terms in later Revenue Acts while providing in other subdivisions of Section 278 for extension by waiver of

the period of limitations on collections, all lead to the inevitable conclusion that there was not intended to be nor was there any authority for extending the period of limitations on collection under the 1924 Act, particularly as to assessments made prior to June 2, 1924, and barred from collection before that date.

Under this contention, therefore, the effect of Section 278(e) of the Revenue Act of 1924 would be to express the intent of Congress, to prevent any misconstruction of Sections 277 and 278, and to specify restrictions which can be stated no better than in the words of Section 278(e) itself that Section 278 (the only provision of law to prescribe or authorize exceptions to the application of the general statute of limitation enacted as Section 277) "shall not (1) authorize the assessment of a tax or the collection thereof by distraint or by a proceeding in court if at the time of the enactment of this Act such asssessment, distraint, or proceeding was barred by the period of limitation then in existence, or (2) affect any assessment made, or distraint or proceeding in court begun, before the enactment of this Act."

In either of the alternative positions covered in the foregoing brief, there is sufficient legal substantiation of petitioner's contentions to justify its claim that the government (or the Collector) erred in enforcing collection of the 1917 tax. If to the weight of arguments presented there is added the rule of statutory construction that taxing statutes, including statutes of limitations, should be liberally construed in favor of the taxpayer (*U. S. v. Updike*, 281 U. S. 490; *Bowers v. New York & A. Lighterage Co.*, 273 U. S. 346, 349), the petitioner should prevail.

CONCLUSION.

The petitioner respectfully submits that Sections 277 and 278 of the Revenue Act of 1924 constitute the sole and exclusive provisions of law covering all cases, relating to the periods of limitation for assessment and collection and authorization for extensions of those periods by waiver or otherwise, Section 277(a)(2) specifying the applicable periods of limitation, and Section 278 specifying the exceptions therefrom; that if Section 278(c) authorizes collection waivers, Section 278(c) is limited in its application by Section 278(e)(1) and (2) from authorizing the extension of the period of limitations for collection of the 1917 tax assessed in February, 1923, and barred before the enactment of the 1924 Act, and since Section 278(e)(1) and (2) prevent Section 278(c) from authorizing such extension, this case does not come within any of the *exceptions* from the application of Section 277(a)(2) of the Revenue Act of 1924; that under Section 277(a)(2) the 1917 tax was barred from collection five years after the return was filed, extended by waiver to April 1, 1924, and any proceeding begun after June 2, 1924, for collection of that tax was in violation of Section 277(a)(2) and invalid;

That, in the alternative, Section 278(c) of the Revenue Act of 1924 authorizes the extension of the period of limitations for assessment only; that there was no provision or authority in the Revenue Act of 1924 for collection waivers, since such waivers were not necessary to carry out the purposes of Sections 277 and 278 of that Act; that the failure to provide for collection waivers is consistent with the intent of Congress that the 1924 Act, Sections 277 and 278, should not authorize any extension

of limitation periods which would affect assessments made before June 2, 1924, or authorize collections barred on that date; that since there was, in addition the specific restrictions in Section 278(e)(1) and (2) which gave effect to the legislative intent, there was no law authorizing an extension by waiver after June 2, 1924, of the time for collection of the 1917 assessment which was assessed and barred from collection prior to June 2, 1924.

The petitioner respectfully submits that the respondent erred in enforcing collection of that 1917 tax and that the Circuit Court of Appeals for the Ninth Circuit erred in holding that the waiver of December 9, 1925, revived the right to collect even though such right was barred prior to June 2, 1924, and that Section 278 was ineffective to prevent such reviver; that the decision of the Circuit Court of Appeals is inconsistent with the legislative intent as it is plainly expressed in Sections 277 and 278 of the Revenue Act of 1924; and that, therefore, the judgment should be reversed.

Respectfully,

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